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# Iron Curtain Statutes - What Is the Standard of Constitutionality

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# Iron Curtain Statutes—What is the Standard of Constitutionality?

## INTRODUCTION

The epic decision of the United States Supreme Court in *Zschernig v. Miller*[1] has raised much controversy regarding Iron Curtain Statutes.[2] As a consequence, probate courts are scrutinizing the legislation of their own states which control the devolution of property to nonresident aliens. The *Zschernig* decision has jeopardized the constitutionality of all probate statutes. This article will proceed to analyze the probate statutes and decisions, prior and subsequent to *Zschernig*, with an eye toward showing that the state courts have overreacted to the decision, and in many instances are applying it indiscriminately.

The fact situation portrayed in *Zschernig* is typical of problems occurring when an Iron Curtain statute is applied. The appellants, residents of East Germany, were the heirs of an American citizen who died intestate. They would have been certain to inherit had they been American heirs. Since they were nonresident aliens, however, one further qualification had to be satisfied—the Oregon Revised Statute, section 111.070.[3] This statute succinctly sets down the criteria for a foreign heir to inherit: reciprocal rights for a United States citizen to inherit from a decedent in the foreign country; proof that American heirs would receive the funds from the foreign country; and assurance that the funds

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1. 389 U.S. 429 (1968).

2. "Iron Curtain statute" is the title that has been given to statutes that determine the right of nonresident aliens to share in the property of American decedents. Since the aliens whose rights are at issue are generally residents of Communist countries, the name "Iron Curtain" became associated with these probate acts. Actually the terminology is a misnomer since the statutes apply to all foreign heirs, whether or not domiciled in a "Communist" country.

3. ORE. REV. STAT., tit. 12 § 111.70 (repealed 1969).

(1) The right of an alien not residing within the United States . . . to take either real or personal property . . . in this state . . . upon the same terms and conditions as inhabitants and citizens of the United States is dependent in each case:

(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take . . . upon the same terms and conditions as inhabitants . . . of the country of which such alien is an inhabitant . . . ;

(b) Upon the rights of citizens of the United States to receive by payment to them . . . money originating from the estates of persons dying within such foreign country; and

(c) Upon proof that such foreign heirs . . . may receive the benefit, use or control of money . . . from estates of persons dying in this state without confiscation . . . by the governments of such foreign countries.

of American decedents would not be confiscated by the foreign government. The statute, in conclusion, provided that if such reciprocal rights were not present, and no other heirs were living, the property would be disposed of as escheated property.[4]

This last provision is crucial since it characterizes the act as an escheat statute. The result is that if the foreign heir can not carry his burden of proof, all his rights as an heir are completely cut off. If there are no heirs other than nonresidents the funds of the decedent escheat to the state. This is not to be confused with a custodial statute[5] which merely impounds the funds until the heir can substantiate his status. This latter statute which predominates among eastern states will be discussed in greater detail *infra.*

The Oregon Supreme Court held that the heirs could take the real property because a reciprocal treaty existed with Germany. Since Article IV of the 1923 Treaty of Friendship, Commerce and Consular Rights with Germany had been construed in *Clark v. Allen*[6] to pertain only to realty, the court was unable to find the required reciprocity concerning personalty and as a consequence the personalty escheated.

The United States Supreme Court in reviewing the Oregon decision noted a distinction between *Clark* and *Zschernig. Clark* was concerned with the statute itself. It was there held that a general reciprocity clause did not, in and of itself, intrude unconstitutionally into foreign affairs. However, Justice Douglas, speaking for the majority in *Zschernig,* was primarily interested with the *application* of the statute. He stated:

> It now appears that in this reciprocity area. . . the probate courts of various states have launched inquiries into the type of governments that obtain in particular foreign nations . . . whether the so called rights are merely dispensations turning upon the whim or caprice of government officials, whether the representation . . . of foreign nations is credible . . . whether there is in the actual administration in the particular foreign system of law any element of confiscation.[7]

The high court injected that the escheat provisions of the statute had traits of confiscation which contradicts the Just Compensation Clause

4. *Id.*

5. The custodial statute offers an entirely different philosophy in dealing with nonresident heirs. Instead of the funds escheating to the state they are held in escrow by the State Treasury until the court is convinced the heirs will have use and benefit. When such proof is certain, the funds are transmitted to the heirs.

6. 331 U.S. 503 (1947).

7. See note 1, at 433, 434.

of the Fifth Amendment. The Justices, however, were troubled most by the inquiries of the probate courts into the administration of foreign law and the policies of foreign governments. It was this involvement in foreign affairs by the state, an area entrusted solely to the federal government, that formed the foundation upon which the statute was declared unconstitutional. The court held that:

> It seems inescapable that the type of probate law that Oregon *enforces affects* international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. The several states of course have traditionally regulated the descent and distribution of estates. But these regulations must give way *if they impair* the exercise of the Nation's foreign policy. [Emphasis added.][8]

This language is of critical importance. When carefully analyzed the words reveal that the Court was not concerned with the statute itself, but the manner in which the statute was "enforced". It would not be unreasonable to conclude that "enforced" as used in this context is synonomous with "applied." Many of the state courts instead of having referred merely to the foreign statute in determining whether reciprocity existed, continued to blast the foreign governments' ideologies and policies. These violent expressions—not the statutes—thrust the state into foreign affairs. The opinion clearly presupposes more than a mere interpretation by the probate courts of their respective statute; it presupposes conduct which "impairs" foreign policy making. The decision, in essence, proscribes any state from voicing foreign policy, especially where the probate courts are used as mouthpieces. *Hines v. Davidowitz*[9] was precedent that the area of foreign affairs is entrusted solely to the President and Congress.

## History of the Statutes

A discussion of the origin and evolvement of Iron Curtain Statutes is imperative to better understand the perplexities courts face today when deciding whether a nonresident alien should share in an American's estate. The Iron Curtain Statutes were originally enacted during World War II to ensure that property of Americans who died would

8. *Id.* at 440.
9. 312 U.S. 52 (1940).

not be appropriated by foreign countries, to wage war against the United States. It was against this background of turmoil that the legislatures took measures to determine the rights of foreign beneficiaries.

The statutes diverged into two distinct groups. On the one hand, the custodial statutes became prominent in the eastern states. Their basic philosophy emphasized a shielding of the estate from confiscation by foreign governments. In so doing, the beneficiary's enjoyment and use of the property was guaranteed. No attempt was made to alter the substantive rights of the intended heirs. The money and/or other property were impounded only when it appeared the legatee would not receive the benefit of the wealth. This procedure placed the legal rights of the heirs in abeyance until they could better substantiate their inheritance.

Inasmuch as New York took the early lead in drafting a custodial statute, it would be appropriate to use its language in illustration. The present New York statute, section 2218,[10] which is very similar to section 269, of the original code, reads as follows:

> Where it shall appear that a beneficiary would not have the benefit or use or control of the money . . . the decree may direct that such money or property be paid into court for the benefit of the beneficiary . . . . The money or property so paid into court shall be paid out only upon order of the court. . . .[11]

Early, *In re Bold's Estate*[12] spelled out the purposes of this statute:

> It contemplated no forfeiture to our state of the legacy . . . of the foreign beneficiary. It was intended to safeguard his rights by permitting the moneys to be held until the time when it might be shown that the beneficiary . . . would receive the funds.[13]

On the west coast an opposing view developed. California was a primary advocate of this new thinking. Its statute, section 259, provides that the estate will escheat when reciprocity is not proven.

> The right of aliens not residing within the United States . . . to take real property in this state . . . upon the same terms and conditions as residents . . . of the United States is dependent in each case upon the existence of a reciprocal right . . . . If such reciprocal rights are not found . . . and if no heirs other than such aliens are

10. N.Y. CONSOL. LAWS ANN., S.C.P.A., § 2218 (McKinney 1967).
11. Section 269 was the original Iron Curtain Statute for New York, but was replaced in 1960 by section 2218. Both sections deal with the rights of nonresident aliens. *Id.*
12. 173 Misc. 545, 18 N.Y.S. 2d 291 (1940).
13. *Id.* at 551, 18 N.Y.S. 2d at 297.

found eligible . . . the property shall be disposed of as escheated property.[14]

Immediately, a fundamental difference between the California statute and the New York code is perceivable. The New York custodial statute is procedural in nature and offers no threat to the heirs' right to inherit. The California probate code (escheat statute), and those resembling it, offer a "now-or-never" proposition. If the foreign heir can not produce convincing evidence of reciprocal rights granted by his country permitting American heirs to inherit, the beneficiary will be excluded forever. Any rights the alien might have asserted are extinguished. The California court in *In re Giordano's Estate*,[15] early held that the California statute was not procedural and was intended to be part of the substantive law of succession.

### *United States Supreme Court Decisions*

Based on these two statutory approaches it was not surprising that the constitutionality of the escheat statute was first tested. With its emphasis on altering the substantive rights of foreign heirs, the statute was suspect. In *Clark v. Allen*,[16] section 259 of the California probate code was attacked as an unconstitutional invasion by the state into the field of foreign affairs. The argument was that the statute sought to promote the right of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California. The court rejected this argument.[17] What must be understood, however, is that the court was only considering the four corners of the statute; the application of the statute was not discussed.

The second United States Supreme Court decision involving an Iron Curtain statute was *Kolovrat v. Oregon*.[18] This time the court tested the Oregon statute—also escheat. The same statute was later declared unconstitutional in *Zschernig*. The right to take, as in all escheat statutes, hinged on the reciprocity issue.

The case itself concerned two residents of Oregon who died intestate. Those next of kin who stood to inherit the estate were all citizens of

14. CAL. CODE ANN., PROBATE, §§ 259, 259.2 (West 1956).
15. 85 Cal. App. 2d 588, 193 P.2d 771 (1948).
16. See note 6.
17. The court emphasized: "What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line." *Id.* at 517.
18. 366 U.S. 187 (1961).

Yugoslavia. The Oregon Supreme Court found the heirs could not take because the prerequisite reciprocity was lacking. The United States Supreme Court upon review concluded that a treaty between the United States and Serbia, entered into in 1881, was controlling. Justice Black, delivering the opinion of the Court, particularized that the state laws controlling the right of aliens to inherit must bow when confronted by the Constitution's supremacy clause. Federal treaties must always take precedence over state law, regardless of the question. The Supreme Court did not find the statute unacceptable for any other reasons.

The final major Supreme Court decision pertaining to the nonresident alien problem, prior to *Zschernig*, was *Ioannou v. New York*.[19] *Ioannou* represents the first challenge to the constitutionality of a custodial statute. The facts showed that a Czechoslovakian assigned her interest in an intestate share of an American decedent's estate to a resident of England. The New York Surrogate's Court dismissed the petition by the London assignee directing the treasurer to pay the share to her attorney. When the case reached the Supreme Court, it was dismissed for want of a substantial federal question.

At this stage in the development of Iron Curtain statutes, the constitutionality issue seemed to stabilize. Custodial statutes had withstood their only constitutional attack. The escheat statutes, although tottering somewhat following the *Kolovrat* decision, had not been conclusively declared unconstitutional. One could predict that if the statute did not attempt to circumvent any existing federal treaties the act was constitutionally sound.

Nevertheless, the Iron Curtain statutes by their very nature were destined to engender legal controversy; if for no other reason because these statutes convened three countervailing legal forces: (1) the dominant position of the federal government in foreign affairs;[20] (2) the exclusive right of the state to regulate rights of succession and intestacy;[21] and (3) the decedent's "right" to dispose of property as he sees fit.[22] Although

19. 371 U.S. 30 (1962).

20. This maxim was substantiated in the *Belmont* case: "Plainly, the external powers of the United States are to be exercised without regard to state laws or policies. The supremacy of a treaty in this respect has been recognized from the beginning. Mr. Madison, in the Virginia Convention, said that if a treaty does not supercede existing state laws, as far as they contravene its operation, the treaty would be ineffective." U.S. v. Belmont, 301 U.S. 324, 331 (1936).

21. In *Irving Trust Co.* it was stated that the Tenth Amendment reserves to the States the power to determine the manner of testamentary transfer of a domiciliary's property and the power to determine who may be made beneficiaries. Irving Trust Co. v. Day, 314 U.S. 556 (1941).

22. It is a general proposition that the courts will try to carry out the intention

these conflicting interests were certain to nurture further controversy, the outcome of the *Zschernig* decision was unexpected. The majority found an unconstitutional intrusion into foreign matters, even though the terms of the treaty did not include the personality at issue. Clearly, this result can not be reconciled with *Clark* which sustained the state statute where no federal treaty had been interposed.

Shortly after *Zschernig*, the appeal of *Goldstein v. Cox*[23] confronted the U.S. Supreme Court. This case, unlike *Zschernig*, questioned the constitutionality of a custodial statute. In contrast to *Ioannou*, the Supreme Court granted certiorari, vacated the judgment in the lower court, and remanded the case for further consideration in light of *Zschernig*.

The real importance of *Zschernig* can only be measured by its impact on the probate courts. This article will now focus on subsequent state decisions. It is submitted that most lower courts have overreacted.

### *State Court Decisions*

Pennsylvania, which has a custodial statute, has experienced several cases of major importance since *Zschernig*. Before discussing the new precedent a brief discussion of the statute prior to it would be helpful to place subsequent decisions in perspective.

In *Belemecich's Estate*,[24] Justice Musmanno distinguished the Pennsylvania statute[25] from Oregon's, *supra*, by emphasizing that in a situation where the heirs could not meet their burden of proof, Pennsylvania's code only *impounded* the estate, whereas the Oregon statute *appropriated* the funds. Musmanno's rationale, which supported the constitutionality of the statute, was abruptly overturned in *Consul General of Yugoslavia at Pittsburgh v. Pennsylvania*.[26] The Supreme Court of the United States granted certiorari and reversed the lower court's

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of the testator. However, it is not a right but a privilege which can be stricken if the court so desires. "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition or even abolish the power of testamentary disposition over property within its jurisdiction." *Id.* at 562.

23. 389 U.S. 581 (1968).

24. 411 Pa. 506, 192 A.2d 740 (1963).

25. Act of July 28, 1953, P.L. 674, PURDON'S PA. STAT. ANN., tit. 20, § 1156 (Supp. 1970):

> Whenever it shall appear to the court that if distribution were made a beneficiary would not have actual benefit . . . of the money or other property . . . the court shall have the power . . . to direct the fiduciary (a) to make payment . . . at such times and in such manner and amounts as the court may deem proper, or (b) to withhold distribution . . . , convert it to cash, and pay it . . . into the State Treasury without escheat.

26. 375 U.S. 395 (1963).

judgment in a per curiam decision. *Kolvorat v. Oregon*[27] was cited as sufficient precedent for the reversal. The court was silent, however, on the constitutional ramifications of the decision. This case made the constitutionality of the statute dubious.

The approach of the State Supreme Court in *Wanson's Estate*[28] is indicative of the court's effort to construe the statute in such a manner as to assure favorable constitutional review. Justice Roberts stated:

> We find nothing in the statutory language of the act or its objectives which expressly . . . prohibits distribution of a decedent's estate to a beneficiary not a resident of the United States . . . . Foreign-residing beneficiaries are not made ineligible to take testamentary bequests, nor does the Act bar or preclude such gifts to them.[29]

The Court proceeded to distribute the residuary of the estate to the Rumanian heirs.

Pennsylvania responded to the *Zschernig* decision with *Struchmanczuk's Estate*.[30] The decedent died intestate, survived by a wife and daughter, both domiciled in the Soviet Union. A new approach to the distribution of the estate was taken. Instead of placing the funds in an escrow account if probable benefit could not be shown, or transmitting the entire funds to the Soviet heirs if they met their burden of proof, the Court chose another alternative. Pursuant to the probate code,[31] only portions of the estate were sent to the heirs. As the heirs demonstrated their receipt, additional funds were forwarded. Exceptions were filed on behalf of the Russian heirs in an effort to obtain the entire amount immediately. Counsel for the widow and daughter argued that it was unconstitutional to withhold the payment in a segmented fashion. The argument declared such actions of the court crossed the boundary into foreign affairs—an area intended to be preempted by the federal government. The tribunal briefly entertained the distinction drawn seven years earlier in *Belemecich* that Oregon had escheat, as opposed to Pennsylvania's custodial language. Judge Klein, nevertheless, was not impressed by the distinction, and based on the new posture taken by the Supreme Court in *Zschernig*, he found section 1156 of the probate

27. See note 18.
28. 419 Pa. 109, 213 A.2d 631 (1965).
29. *Id.* at 112, 213 A.2d at 633.
30. 44 D. & C. 2d 155 (Orph. Ct. 1968).
31. See note 25.

code,[32] and section 737 of the Fiduciaries Act[33] as unconstitutional encroachments into foreign affairs. This conclusion was reached by the Pennsylvania court's judging the constitutionality of the statute by looking to its four corners, rather than evaluating the method of its application. It is submitted that *Zschernig* was decided on a much narrower issue. It was designed to stifle the practice of the local probate judges injecting derogatory remarks toward foreign governments. The statute should not have been invalidated until a further investigation of lower court opinions revealed the type of unnecessary ridicule prohibited by *Zschernig*. Perhaps the court in *Struchmanczuk* unconciously recalled some of these recently proscribed outbursts for they are commonplace. In *Zupko's Estate*, Judge Bologer commented: ". . . We must take judicial notice of the *wholesale disregard of human and of property rights* in the U.S.S.R. and the *complete lack of morals*, as we know them, pervading the operation of the Soviet system."[34] Judge Klein's remark was similar in *Soter's Estate:*

> We share hopes . . . that the 'Cold War' will thaw, and that the nations of the world may find a way to live together . . . . Until this happy day arrives, we must view events realistically. And this requires us to conclude the citizens of Albania are being deprived of their rights and liberties by a small group of *despotic fanatics* . . . .[35] [Emphasis added.]

The court, however, failed to mention these frequent abuses of the constitutional guidelines set down by *Zschernig*. *Struchmanczuk* as it now reads could be cited for the proposition that the Pennsylvania statute was unconstitutional on its face, which is not accurate. It is improbable that the Supreme Court of the United States intended such an interpretation of *Zschernig*. To do so would completely emasculate the state's constitutional prerogative to determine the devolution of property.[36] To interpret *Zschernig* so broadly is to swing the pendelum too far in the opposite direction, thereby improperly directing federal involvement in purely state affairs. This authorization is also constitutionally questionable.

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32. *Id.*
33. Act of April 18, 1949 P.L. 512, PURDON'S PA. STAT. ANN., tit. 20 § 320.737 (Supp. 1970).
34. 15 D. & C. 2d 442, 454, 455 (Orph. Ct. 1958).
35. 34 D. & C. 2d 6, 9 (Orph. Ct. 1964).
36. The right to control the passing of property at death, as reserved to the states under the Tenth Amendment was determined in Irving Trust Co. v. Day, 314 U.S. 556 (1941).

A more recent Pennsylvania decision is *Makery's Estate*.[37] The opinion ordered funds that had been placed in escrow sent directly to the beneficiaries. The court's decision was militated by *Struchmanczuk*. Although the results of these cases may be just, there is no assurance that such broad interpretation will continue rendering acceptable conclusions.

Other state courts have handled the *Zschernig* decision differently. New York's statute, section 2218,[38] is custodial and resembles the Pennsylvania law. The act was amended following *Zschernig* and a new subdivision added, but it still reads as an eastern statute.[39]

The major decision rendered since 1968, within New York's jurisdiction, was *In re Estate of Leikind*.[40] This case is significant, since even in light of *Zschernig*, the Court of Appeals upheld the constitutionality of the statute. The petitioner applied for an order directing that his judgment against Dvaireh Kamensky be satisfied out of funds placed in escrow with the State Treasury. Dvaireh was a Russian resident and beneficiary of the estate of Leikind. Her funds had been deposited pursuant to the custodial statute applicable. The petitioner-creditor based his argument squarely on *Zschernig*. He asserted that the New York statute, like the Oregon legislation, was an unconstitutional encroachment into foreign affairs.

The court noted that unlike the Oregon statute, the New York law contained no forefeiture provisions. It was further postulated that this distinction could be critical in sustaining the New York statute. The thrust of the opinion, however, was directed toward the statute's *application*.

> . . . [T]he majority opinion in the *Zschernig* case, in accepting the constitutionality of 'reciprocity,' arguably accepted 'benefit, use or control' provisions as valid provided State Courts did no more than *'routinely read'* foreign laws and provided there was no palpable interference with foreign relations in their *application*. Thus, if the courts of this state, in applying the 'benefit or use or control' requirements, simply determine without animadversions, whether or not a foreign country . . . . prevents its residents from actually sharing in the estates of the New York decedents, the stat-

37. 46 D. & C. 2d 196 (Orph. Ct. 1969).
38. See note 10.
39. Section 269-a, the predecessor of § 2218, was interpreted as follows "That section is intended to safeguard an inheritance by withholding it temporarily . . . until the time arrives when the beneficiary might use and enjoy it for himself. In re Estate of Petroff, 49 Misc. 2d 233, 236, 267 N.Y.S. 2d 8, 11 (Surrogate's Ct. 1966).
40. 22 N.Y. 2d 346, 239 N.E. 2d 550, 292 N.Y.S. 2d 681 (1968).

> ute would not be unconstitutional under the explicit rationale of the Zschernig case. Indeed, petitioner has made no showing that the lower courts . . . engaged in the conduct criticized . . . as interference with foreign relations.[41] [Emphasis added.]

This distinction is of manifest importance. A careful reading of *Zschernig* affirms the approach taken by the New York court. Whether the New York courts will continue to uphold their probate statute remains questionable, but the subsequent cases to date attest to a continual reaffirmance of *Leikind.*

Some questions were raised regarding the *Leikind* case when *Goldstein v. Cox*[42] was remanded to a three judge court for further consideration of its constitutional issues. The petitioners moved for a summary judgment contending *Zschernig v. Miller* necessitated a conclusion that section 2218 was unconstitutional on its face. Summary judgment was denied and the appellants petitioned the Supreme Court of the United States pursuant to Federal Rules of Civil Procedure.[43] The Supreme Court dismissed the appeal for want of jurisdiction.[44] The court's handling of the case lends support to *Leikind* and its "application" approach.

In, *In re Estate of Becker,*[45] a resident of East Germany, petitioned that certain moneys in the custody of the Director of Finance of New York, be issued to him as lawful heir under the New York intestacy statutes. The court recognized the constitutional obstacle which *Zschernig* posed, but chose to follow the distinction adopted in *Leikind.* Judge Silverman concluded that the alien had demonstrated use, benefit, and control of the money and, therefore, the estate should be distributed immediately. Perhaps an indirect influence of *Zschernig* can also be detected from this New York decision. Although the tribunal interpreted *Zschernig* correctly, a trend toward lessening the burden of proof for nonresidents is evident from Judge Silverman's opinion. Prior to *Zschernig* many East Germans, situated similarly to those in *Becker,* were denied their heirship because the "cold war" courts were not convinced that the East Germans would receive the estate.[46] The *Becker*

41. *Id.* at 352, 239 N.E. 2d at 553, 292 N.Y.S. 2d at 686.
42. 391 F.2d 586 (2d Cir. 1968) *rev'd per curiam;* Goldstein was briefly referred to in the introduction. It was decided about the same time as *Zschernig.* This cite includes the final appeal to the Supreme Court which culminated in the Court's dismissal.
43. 28 U.S.C. § 1253 (1966).
44. 396 U.S. 471 (1970).
45. 61 Misc. 2d 46, 304 N.Y.S. 2d 628 (Surrogate's Ct. 1969).
46. *In re* Thomae's Estate, 199 Misc. 940, 105 N.Y.S. 2d 844 (1951), and *In re* Nezold's Will, 1 Misc. 2d 611, 148 N.Y.S. 2d 197 (1956), reached contrary results. In both cases

court, however, has apparently recognized private ownership in the "Iron Curtain" countries.

The only case to date which casts doubt on the soundness of the New York statute is the obscure decision, *In re Estate of Emilia Lehotzky*.[47] The Surrogate of Bronx County held that he had no right to impound the proceeds of the estate. Instead, the court ordered that the resources be sent directly to the beneficiaries. The impact of *Lehotzky* appears negligible since it was never tested in the higher courts of the state.

It is suggested that the approach taken by the New York courts is the better view. It is the stand which must be taken, if the states' right to control the devolution of property is not to be eroded away.

Further insight into the probate courts' handling of the foreign heir problem is provided by certain Ohio decisions. An analysis of Ohio's post-*Zschernig* cases reveals the *First National Bank of Cincinnati v. Fishman*[48] decision where the court was confronted with that state's custodial statute.[49] The rationale suffered from the same infirmities as the *Struchmanczuk* decision. *Zschernig* was applied in a carte blanche fashion without an inquest into whether the statute was conducive to actions forbidden by the Supreme Court.

Although the identical result was reached in *Mora v. Battin*,[50] the reasoning exhibited at least a technical understanding of *Zschernig*. It was explicitly stated:

> The Ohio statute requires the probate court to determine whether or not the foreign legatee will have the benefit . . . 'because of circumstances prevailing at the place of residence of such legatee.' The Ohio statute thus appears to be directed at an inquiry into the operations of the foreign government . . . and social conditions prevailing in the foreign country. This type of inquiry is specifically prohibited by the doctrine of *Zschernig v. Miller*.[51]

The approach enunciated in the *Mora* case is sensitive to the distinction drawn by the Supreme Court in *Zschernig* between the application of the statute, and the statute itself. Only with this distinction in mind can the Iron Curtain statutes be properly interpreted, at the state level, under the *Zschernig* rationale.

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the heirs were East German beneficiaries. In neither case could they satisfy the court of their use and benefit since they were East Germans.

47. NEW YORK LAW JOURNAL, Jan. 29, 1968, p. 18.
48. 16 M. 85, 239 N.E. 2d 270 (Probate Ct. 1968).
49. OHIO REV. CODE ANN., tit. 21, § 2113.81 (1968).
50. 303 F. Supp. 660 (N.D. Ohio E.D. 1969).
51. *Id.* at 664.

The discussion thus far has been limited to the reaction of custodial-oriented states. Since *Zschernig* arose from an escheat state, attention will be turned to examine the impact it has had on the western states. California with its escheat statute is a prime example.[52]

Prior to the decision in *Zschernig, In re Estate of Larkin*[53] illustrated the position of the California courts regarding their probate laws and the foreign heir dilemma. Based on voluminous reports and lengthy testimony the court concluded that citizens of the United States enjoy a reciprocal right to inherit property from Soviet estates on the same terms, conditions and standards as Soviet citizens.[54] The court was quite candid in its appraisement of the constitutional problem. The court felt that whatever its reactions to the methods of the Soviet Union might be, it must confine itself to the issues raised by the statute. To do otherwise would unduly extend the province of the court.[55]

Had all the probate courts accepted this philosophy *Zschernig* would never have been decided. This California tribunal saw the crux of the problem at its incipiency. Nevertheless, not all the California decision makers followed this lead. The judges in *In re Estate of Kraemer*,[56] overreacted to *Zschernig* as did many others. Although the court may have had a basis for its result,[57] it again spoke in generalities. It simply paralleled section 259 of the Probate Code with section 111.070 of the Oregon Revised Statute, and concluded that since the two were similar, California's statute must be unconstitutional.[58] This is but another example of *Zschernig* being misapplied.

A more logical interpretation of *Zschernig* is illustrated by *Gorun v. Fall*,[59] a Montana case, where section 91-520[60] of the probate code was

52. See note 14.
53. 52 Cal. Rptr. 441, 416 P.2d 473 (1966).
54. Professor Harold Berman of the Harvard Law School and Harvard Research was the principle witness. Based on personal experience and extended study he wrote an enlightening article dealing with Soviet heirs. Berman, *Soviet Heirs in American Courts*, 62 COLUM. L. REV. 255 (1962).
55. See note 53, at 459, 416 P.2d at 491.
56. 81 Cal. Rptr. 287, 276 Cal. App. 2d 865 (1969).
57. Language which was forbidden by *Zschernig* was also evidenced in the California courts:
> We hold there is no such thing as a 'right' in the U.S.S.R., as we understand it in this country. Soviet statutes merely confer conditional rights or privileges which . . . may be withdrawn without the consent of the citizen at the whim of the government.
Matter of Estate of Gogabashvelle, 16 Cal. Rptr. 77, 195 Cal. App. 2d 503 (1961).
58. "And consequently under the same rationale, section 259 of the Probate Code . . . which is substantially a restatement of subdivision I of the Oregon Revised Statute, must also fall for the same reason." See note 56, at 294.
59. 287 F. Supp. 725 (D. Montana Helena Div. 1968).
60. MONT. REV. CODES ANN., tit. 91, § 520 (1964);
> No person shall receive money or property . . . as an heir . . . of a deceased person

at issue. Plaintiffs, residents of Rumania, were certain to inherit unless the probate code was *contra.* The heirs asserted *Zschernig v. Miller* as precedent for finding the statute unconstitutional. The court made it clear that *Zschernig* did not overrule *Clark v. Allen,* nor did it declare reciprocity statutes, ipso facto, unconstitutional.

> It seems clear from Zschernig that reciprocity statutes are *not unconstitutional per se* and that if a state reciprocity statute requires that the state courts do no more than read the law of a foreign nation . . . then the law does not infringe upon the prerogatives of the court.[61] [Emphasis added.]

The court in its analysis further stated that, in interpreting the Montana law previous to the 1966 amendment,[62] questions of foreign law were factual. The change in procedure, however, made these inquiries a legal issue. The application of section 91-520 was found responsive to the requirements set forth in *Zschernig,* and the statute was found constitutionally acceptable.

*Gorun v. Fall,* furnishes the states with another possible solution when confronted with an "Iron Curtain" situation. With a procedural change making the determination legal rather than factual, the courts are precluded from probing into the political, social and philosophical aspects that are so patently enjoined by *Zschernig.*

## Conclusion

This article should make it obvious that a very real need exists for a careful interpretation of the Iron Curtain statutes. A majority of the courts are applying *Zschernig* too broadly. The decision was intended to terminate probate action that intruded into foreign relations. These misapplications are certain to have constitutional overtones, especially where states are deprived of their control over the passing of property at death.

*Gorun v. Fall,* in an escheat state, and *In re Estate of Leikind* in a custodial jurisdiction, provide working alternatives to avoid invalidating the respective Iron Curtain statutes as unconstitutional per se. *Gorun,*

leaving an estate . . . in the state of Montana, if such heir . . . is not a citizen of the United States and is a resident of a foreign country, at the time of death . . . unless, reciprocally the foreign country in question would permit the transfer to an heir . . . residing in the United States, of property left by a deceased person in said country.

61. See note 59, at 728.

62. Rev. Codes of Mont., ch. 2701, Rules of Civil Procedure—Rule 44.1 (1969).

by adopting its procedural law, and *Leikind*, by recognizing the "application" distinction, may provide solutions to the quandary concerning foreign inheritance.

The final tribunal, the United States Supreme Court, could also render assistance in dealing with these statutes. Justice Harlan's concurring opinion in *Zschernig* should be noted. Harlan draws attention to Justice Brandeis's opinion in *Ashwander v. Valley Authority*: "The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . ."[63] Justice Harlan believed the same result could have been achieved by construing the 1923 treaty so that the Oregon statute was non-applicable. He suggests that the courts should determine initially whether the statutes include reciprocal provisions; if they do not the constitutional issue is never reached. Furthermore, he considered the facts of *Zschernig* indistinguishable from *Clark v. Allen*, and that *Clark* should have served as precedent for *Zschernig*. Thus, the Iron Curtain predicament could be bypassed by avoiding constitutional issues where possible. Although the approach offered by Harlan would be useful in most foreign heir situations, a case similar to *Zschernig* would have been forthcoming regardless—certain probate courts had to be muffled. It is hoped that by silencing the state courts in foreign matters, they are not also handcuffed in controlling the devolution of property.

FREDERICK B. GIEG, JR.

63. 297 U.S. 288, 346 (1935).